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Legal Department (M-495)

P.O. Box 1926

Spartanburg, SC 29304

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

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RECORD OF ORAL HEARING  
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Ex parte ROY PHILLIP DEMOTT,  
TIM MEADE,  
and JIM PORTERFIELD

Appeal 2008-3308  
Application 10/617,923  
Technology Center 1700

Oral Hearing Held: July 9, 2008

Before BRADLEY R. GARRIS, CATHERINE Q. TIMM,  
and KAREN M. HASTINGS, Administrative Patent Judges

ON BEHALF OF THE APPELLANT:

JOHN E. VICK, JR., ESQUIRE  
Milliken & Company  
Legal Department (M-495)  
P.O. Box 1926  
Spartanburg, South Carolina 29304

1           The above-entitled matter came on for hearing on Wednesday,  
2   July 9, 2008, commencing at 1:29 p.m., at the United States Patent and  
3   Trademark Office, 600 Dulany Street, Alexandria, Virginia, before Christine  
4   L. Loeser, Notary Registration No. 334477, Notary Public.

5           JUDGE GARRIS: Welcome to the board, Mr. Vick.

6           MR. VICK: Thank you.

7           JUDGE GARRIS: As you know, you have about 20 minutes,  
8   and please begin when you are ready.

9           MR. VICK: Very good. Thank you, Judges, for having me this  
10   morning -- this afternoon. I appreciate the opportunity to come and talk to  
11   you about this case.

12           It's perhaps a little more straightforward than some appeals.  
13   Not too many references and the claims are fairly straightforward, I believe.

14           I want to start, I guess, by introducing myself. My name is  
15   John Vick. I work at Milliken & Company in South Carolina. I have been a  
16   patent attorney for about 20 years. I have had a few opportunities to come to  
17   the board but not too many.

18           I brought a few samples, examples. These are not technically  
19   part of the evidence in the case below. These are just things that happen to  
20   be examples to try to explain to you what is meant by some of the words in  
21   the specification.

22           They are not technically part of the record. I don't intend for  
23   you to keep them as part of the record, but I wondered if at an appropriate  
24   time when I'm talking about some of the words in the claim if I could show  
25   you samples so that you could understand a pile versus a non-pile fabric and  
26   the like. Would that be acceptable?

1 JUDGE GARRIS: Sure. That would be fine.

2 MR. VICK: Okay, good.

3 First of all, the invention. The invention is a textile, and the  
4 company I work for, Milliken, does make textiles of all kinds. It's a textile  
5 of a specific type. It's a layered textile, first of all, and it's a composite. It  
6 has a pile surface.

7 I will show you in moment, I'll go through and I will pass these  
8 to the bench so you can see what I'm talking about.

9 It has a pile surface which you may be familiar with that.  
10 Carpet, of course, has a pile. Some textiles have piles. Some textiles do not  
11 have piles. That is always a feature of whether or not a textile has a pile or  
12 whether it doesn't.

13 The most important thing perhaps about this textile is that it is  
14 nonwoven. If you are familiar with textiles, and you probably are, there's a  
15 lot of different kinds of nonwoven.

16 But the world of textiles is divided into at least two categories:  
17 Wovens that are made on a weaving machine, the way the Egyptians began  
18 making them, weaving fabric, weaving yarn, woven, and then nonwoven.

19 There's a lot of different ways to make nonwovens, several  
20 different ways. One of the ways to make nonwovens is using a process  
21 called needle punching. That is the process used to make this invention. A  
22 needle-punch machine -- I wish I could have brought one with me but they  
23 are about half the size of this room.

24 They are very interesting to watch. They run at very high  
25 speed. A needle-punch machine has needles and it takes fibers that are laid,  
26 carded fibers that are laid in a bed, if you will, and then by rapid, rapid

1 action of the needle, as the fabric moves through, the needles cause the  
2 fibers to become interlocked.

3 Interlocking short fibers that are laid in a card, that is needle  
4 punching, which is not even in the same category as the weaving of fabrics  
5 with yarn where you have a warp and a weft.

6 JUDGE TIMM: Rubin does -- it seems to be directed to not  
7 just woven fabrics but it says a fabric that could be woven, nonwoven or  
8 knitted, correct?

9 MR. VICK: There is a statement about a possibly a nonwoven  
10 in Rubin, that's right. And of course, no reference to needle punching.

11 JUDGE TIMM: However, would you say the Eschenbach  
12 reference teaches the needle-punch nonwoven fabric which is what you are  
13 claiming?

14 MR. VICK: Yes. It teaches a needle-punch fabric, that is right.  
15 Let me go on to the other features of the fabric, but that's exactly right.

16 Yes, Eschenbach, which was cited as the secondary reference,  
17 does teach a needle-punch fabric. Needle punching is not new. And this  
18 invention is not just needle punching. At least I am trying to set the stage for  
19 the context of the claims.

20 So the mechanically interlocked staple fibers, a pile side and a  
21 nonpile side in this invention, a binder material in several of the claims, and  
22 in the most featured embodiment, the binder, would just be on the second  
23 side of the fabric because it is not needed on the pile surface.

24 Then an adhesive layer and a film layer, a polymeric film. I can  
25 pass some of these to you which you can look at as I go on. May I approach  
26 the bench?

1 JUDGE GARRIS: Please, sir.

2 MR. VICK: These are just things I picked up on my way out  
3 the door. I don't have something that I can show you that I say, This is the  
4 invention, which I apologize for. There was just not available the invention,  
5 a prototype of the invention, but I picked these things up.

6 This is, of course, a typical woven fabric, it's just a polyester  
7 woven which is well known. To be contrasted with, this is, for example, a  
8 nonwoven and some of these things you have probably seen before.

9 Here is another example of a nonwoven, and you will notice the  
10 pile, and this one, for example, has the pile on one side but not the other, and  
11 then -- yes, and that one has the pile on both.

12 Of course, the pile is very important to the feel in hand of the  
13 fabric, and the lack of a pile is also important. This happens to be a woven  
14 fabric but it is also -- has a coating on the back, but of course, it has no pile.  
15 No pile.

16 This fabric can be very useful for automotive applications  
17 where it can be used, this last one, automotive seating. This invention  
18 actually also does find its application for automotive seating.

19 The point of the film is to make it extremely water-  
20 impermeable, which can be used for boating and for automotives where you  
21 can literally wash the car out with a hose.

22 This is a big feature of one of the fabrics that Milliken makes  
23 for Honda Element called XFC fabric. It's just a really popular fabric with  
24 young people and with outdoor enthusiasts and with boaters for boating  
25 because it is so water-repellent because of the film, but also one other  
26 feature is a lack of a pile, and there is an optional repellant on it as well.

1                   So turning to the Rubin reference, which is the primary, I would  
2 discuss the 103 rejection first and then I will move on to the 112. There is  
3 one remaining 112 rejection and I will deal with it at the very end if you  
4 don't mind.

5                   The 103 rejection, Rubin, and Rubin describes -- it's actually a  
6 reference that we have seen in other applications, but Rubin describes a  
7 woven polyester fabric. That is the main example. That is the primary  
8 thrust of Rubin, a woven polyester that has a fluorochemical treatment on it.

9                   Fluorochemicals are well known, and our company actually  
10 provides a huge amount of fluorochemical-treated woven polyester fabric all  
11 the time. Very common in the industry. It can be used for apparel, garments  
12 and all sorts of garments that need water repellency or oil repellency. That's  
13 the main thrust of Rubin.

14                  I do concede that there is one word in Rubin, I think one time,  
15 one word of nonwoven. But no examples and no explanation of what kind  
16 of a nonwoven. I know there is probably at least four or five different kinds  
17 of nonwovens in the world, major categories.

18                  Rubin doesn't describe which one it would employ. It really  
19 deals primarily with the woven and doesn't describe how it would  
20 manufacture a nonwoven. So that's one of the main points of Rubin.

21                  JUDGE TIMM: Would there be a big difference between  
22 putting an adhesive and a polymeric backing film on a woven versus a  
23 nonwoven?

24                  MR. VICK: Applying an adhesive and a film?

25                  JUDGE TIMM: Isn't that the thrust of the Rubin reference  
26 there? They are treating it and putting on a backing.

1           MR. VICK: That's right. Well, there could be. There could be  
2 technical differences certainly; especially if you have a pile on one side of  
3 the fabric, it's going to make a difference on how you can apply an adhesive  
4 or a film.

5           Another question would be why would you want -- what would  
6 make a person want to deviate from Rubin and substitute a nonwoven when  
7 Rubin seems to be happy with his woven fabric? He doesn't indicate, at  
8 least anything I see, where he finds any displeasure with the woven for his  
9 garment or apparel-type application.

10           I don't have the complete answer for you on that. I think that  
11 there are differences.

12           If you look at some of the samples that I provided there, when it  
13 comes to processing and actual manufacturing, the strength of the fabric and  
14 how well it can be calendared and whether or not the spray will go down  
15 into a nonwoven that is fluffy, that has a thicker structure, a pile structure,  
16 versus a flat fabric, a woven flat fabric.

17           There could be significant processing differences. I don't know.  
18 I don't have those with me and we didn't make that an argument.

19           So of course, again, Rubin again discloses essentially a flat  
20 fabric. I haven't seen any disclosure in Rubin or even a suggestion of using  
21 a pile. And again, I guess one of the issues with this rejection that I think  
22 makes it difficult for us sometimes, and several times in this rejection, we  
23 have official notice being taken of a certain fact.

24           It is true that all of the inventions that come before you are  
25 combination of elements. If all of our rejections are going to be, Well, we



1 found one reference that has, say, two of your six elements, and the other  
2 four, we'll just take notice that that exists.

3 And since it is not a new element of matter which, of course,  
4 nothing, almost nothing is, we know that is somewhere in the art. We don't  
5 have a reference but we just state that it is.

6 Element 4, we just state that that's in the art somewhere without  
7 producing a reference. The fifth element, we'll state that that's in the art and  
8 then say, You haven't contested that; therefore, it's obvious.

9 I think this approach is making it very, very difficult, almost  
10 impossible for new combinations in the textile art to be patented, much more  
11 difficult than it used to be.

12 So we are asking, I guess, for some assistance on the  
13 obviousness issue here. The other issues with regard to obviousness -- and I  
14 want to make sure I get to these -- the claims have been narrowed and  
15 specifically, some of the claims have been narrowed to disclose an acrylic  
16 latex.

17 And there are a lot of different types of latexes, some of which  
18 might work well in this application and some of which might not, but we  
19 disclose and claimed an acrylic latex. Acrylic is not disclosed in Rubin and  
20 some of the claims disclose it just for application to one side.

21 Rubin, on the other hand, discloses a completely different  
22 method. Rubin deals mostly with fluorochemicals, not with latexes. It does  
23 use the word "latex," but again, that's not the thrust of it. It doesn't disclose  
24 at all acrylic latexes.

1 But Rubin discloses taking the textile and running it through a  
2 bath; in other words, completely submerging the textile in a bath so the  
3 textile is saturated, saturated with the fluorochemical.

4 Our invention, on the other hand, does not work that way. We  
5 don't have a fluorochemical here in our claims, except maybe as a dependent  
6 optional claim.

7 But what we have here is an acrylic latex, an acrylic latex that  
8 can be applied in two different ways, as disclosed in the spec, which could  
9 or couldn't be combined.

10 One is to spray it on and it shows a spray applicator, as a spray  
11 which, of course, would be applied to one side. That sort of application, that  
12 sort of structure and process is not disclosed at all in Rubin.

13 In fact, Rubin would coat the entire textile by running it  
14 through the bath. Rubin would have all parts of the textile coated with  
15 whatever substance you are coating it with, fluorocarbon in the case of  
16 Rubin.

17 JUDGE TIMM: The examiner makes the point that the way  
18 your claims are crafted, it's simply a binder material applied to a second  
19 side, and that is not really limiting the claim to actually structurally ending  
20 up with the binder on just one side.

21 MR. VICK: That's true. We do disagree with that because first  
22 of all, we do believe that the claims are clear that the binder material is on  
23 the second side.

24 JUDGE TIMM: What language would you point to for that?

25 MR. VICK: Well, again, like in claim 1, element B, a binder  
26 material applied to the second side.

1 JUDGE GARRIS: I think the point here is it doesn't say that  
2 it's applied only to the second side, meaning that it appears claim 1 would  
3 encompass an embodiment where the material would be on the second side  
4 and also on the first side and also dispersed in between.

5 JUDGE TIMM: Moreover, you could apply it to one side and it  
6 could transfer throughout. The claim doesn't structurally require that it  
7 remain on the one side.

8 MR. VICK: I know theoretically that is true, but even if it was  
9 true, it wouldn't -- there's still no obviousness in light of Rubin.

10 JUDGE GARRIS: Let me just clarify in my own mind, do you  
11 argue that Rubin applies a fluorochemical of some kind? Does this  
12 fluorochemical of Rubin perform a binder function? Is it, in fact, a binder?

13 MR. VICK: Not to my knowledge. Its purpose is as a  
14 repellant. It's normally on the face of the fabric.

15 JUDGE GARRIS: Is there any disclosure at all of a binder  
16 feature of your claim in Rubin?

17 MR. VICK: Actually, you know, there is no need for a binder  
18 with Rubin because the fabric is woven.

19 JUDGE GARRIS: From a nonwoven embodiment.

20 MR. VICK: The only reason we need -- the one reason we  
21 need a binder in ours is because it's a nonwoven. The binder binds the fibers  
22 together.

23 When the fibers are not woven, they must be bound together.  
24 That's the point, is in ours it's the glue that helps bind our fibers. In Rubin,  
25 it's disclosing a woven, basically.

1 JUDGE GARRIS: It also discloses a nonwoven as well. I  
2 mean, that word is and the disclosure is implied.

3 MR. VICK: That word is there.

4 JUDGE GARRIS: But your point is he does not also disclose  
5 using a binder in the context of his nonwoven teaching; is that correct?

6 MR. VICK: I believe that's right. I would stand on whatever  
7 the text of Rubin says. I don't mean to overrule the text, but it is not my  
8 belief that Rubin's fluorocarbon would serve any binding function at all,  
9 based on my knowledge in general of how fluorocarbons are applied to  
10 fabrics.

11 Usually it's for water repellency. There are a series of Rubin-  
12 related patents that deal with water repellency and fluoro treatments as  
13 opposed to, again, in our case, a binding function where it's actually  
14 physically binding those fibers together and binding them to the adhesive.

15 JUDGE GARRIS: We are starting to run out of time, so why  
16 don't you get to your argument against the examiner's position of  
17 obviousness with respect to adding to the Rubin disclosure of the use of the  
18 claimed binder, the binder of claim 1.

19 MR. VICK: I'm sorry. What was that last statement?

20 JUDGE GARRIS: How does the examiner achieve the claim 1  
21 requirement for an acrylic latex binder? What references is he relying on for  
22 that?

23 MR. VICK: Right, right. The primary reference is Rubin.  
24 Eschenbach, of course, is taught -- well, the two things that are added to  
25 Rubin, the only reference that is added to it is Eschenbach, and also then just  
26 these official notices that certain things exist in the art.

1           But primarily, two of the primary items that the invention has  
2 that I think are not present here is in either reference or that there's also no  
3 reason to combine these references.

4           Eschenbach is, as I said, it is a nonwoven needled embodiment,  
5 but of course, it doesn't have a film attached to it. And therefore, it is not  
6 even containing the type of deposit that we have here. If Eschenbach  
7 theoretically had a film, maybe it would have been a primary reference.

8           But we haven't -- again, I haven't seen and I don't believe there  
9 is any suggestion or reason or motivation in Rubin or in Eschenbach that the  
10 elements of some should be substituted for the other.

11           Obviously, motivation in light of KSR has taken a further  
12 backseat; however, even in KSR, it still says in that opinion that it's still  
13 important to identify a reason -- a reason why a person of skill in the art  
14 would seek to combine these references and pull the elements of one out and  
15 insert them into the other.

16           I don't believe the Office Action has identified a reason for  
17 doing that. I think it's just -- it seems to be taking official notice of claimed  
18 elements that it can't find in the art. I don't believe it's an appropriate 103  
19 rejection.

20           Another argument, if I have just a second, I would like to get  
21 on, is Rubin is very clear, is very clear about wishing to retain the soft hand  
22 and feel of the textile. That is a stated goal of Rubin.

23           However, the use of a binder, as in this invention, would be  
24 directly opposite that stated goal of Rubin, and therefore an acrylic binder  
25 could not be used the way Rubin uses his fluorochemicals.

1           If you took our acrylic binder and run the textile through it as a  
2 bath like Rubin does, if you follow the teachings of Rubin but substituted an  
3 acrylic binder, you would have a textile that no one would want to touch. It  
4 would be hard as a rock.

5           So the teachings of Rubin are not consistent with the use of an  
6 acrylic binder, and I'm getting back to what Judge Garris had asked me to  
7 respond to about the binder issue.

8           JUDGE GARRIS: Maybe at this point, since we are running  
9 out of time, we only have just a few minutes left, you do have claim 27,  
10 which defines the textile but does not require the presence of any kind of  
11 binder. Why don't you tell us why you believe this claim distinguishes over  
12 the prior art.

13           MR. VICK: For claim 27, it is broader in some respects and  
14 narrower in other respects. I think it is -- first of all, it enjoys the same  
15 feature that Rubin lacks, in my mind, is Rubin does not disclose a needled  
16 nonwoven layer.

17           Again, a needled nonwoven is a certain kind of nonwoven that  
18 is made by needling and interlocking the fibers. Again, absent from Rubin,  
19 it also discloses claim 27 in element A, the specific types of fibers that  
20 would be used in a needled nonwoven, and those are polyester  
21 polypropylene.

22           It also discloses a flame retardant. Claim 27 is even more  
23 narrow that it discloses a flame retardant which even the examiner admits in  
24 the office action that she has no reference with a flame retardant.

25           JUDGE TIMM: I thought the examiner relied upon Rubin for a  
26 flame retardant that is mixed in with the fluorochemical treatment agent.

1           MR. VICK: Let me see if I can find that here. She did say that  
2 the prior art in her office action or in her statement in response to my brief,  
3 the prior art does not explicitly teach fibers containing a flame retardant.

4           However, it is well known in the art to employ flame retardant  
5 fibers. Again, here we go with it's well known so an element fails to be  
6 disclosed in the art that's cited but yet it claims it is well known and  
7 therefore combinations are --

8           JUDGE GARRIS: You disagree with that statement?

9           MR. VICK: I beg your pardon.

10          JUDGE GARRIS: Do you disagree that it's well known to use  
11 a flame retardant?

12          MR. VICK: In the context of this invention, it's not well  
13 known. Flame retardants are known. We didn't invent those, but in the  
14 context of this invention, it is not well known.

15          I don't believe any reference discloses what is in claim 27.  
16 Again, I think that's where we have confusion between the fact that  
17 something is known in the world versus is it known in the context of this  
18 invention.

19          And in this combination -- and again, it's only in this  
20 combination that we are claiming a flame retardant. Only in the specific  
21 automotive fabric combination with the pile, adhesive layer, a film layer and  
22 a needle nonwoven.

23          JUDGE TIMM: With regard to the first rejection, she does  
24 point out on page 4 of the answer that the fluorochemical treatment  
25 preferably is a latex composition and may also include a fire retardant. She  
26 points to column 3, lines 54 through 60, and column 5, lines 6 through 12.

1                   MR. VICK: Okay. And a fire retardant, if that is actually the  
2 word in the reference -- and I don't have that in front of me -- but it could be  
3 -- you know, there's a lot of ways to achieve fire retardancy. One way is to  
4 apply a chemical to a textile.

5                   But again, what we are claiming in claim 27 is a fiber that is a  
6 flame-resistant fiber. Again, that is some of the distinction but it's not the  
7 main distinction here. It's just one of the features of claim 27.

8                   But to try to fully answer your question, Judge Garris, I believe  
9 that's the primary difference with claim 27 versus the other claims.

10                  JUDGE GARRIS: At this point, you should very briefly  
11 discuss the 112 rejection.

12                  MR. VICK: Okay. I will say on the 112 that we still do  
13 disagree with the finding on the 112, and the main point there is -- and the  
14 examiner has raised an interesting issue that I haven't seen a lot with regard  
15 to 112, but that is, we disclose two different ways in claims 8 and 42 to  
16 achieve the binding of these nonwoven needled fibers together with a  
17 binding material.

18                  One way is to use a low-melting-point polyethylene-type fiber  
19 or a bicomponent fiber that has such a low melting point that when the  
20 textile is processed, it melts and therefore forms the interconnections  
21 between fibers. That is one way.

22                  Another way is to spray a liquid binder on to the textile, and the  
23 specification makes clear that both can be done. I will concede that the  
24 specification does not specifically, expressly say that you should do both.



1                   On the other hand, I guess our argument is that -- an analogy is  
2 if one way of holding up your pants is to use a belt and another disclosed  
3 way is to use suspenders, I don't believe it's any kind of a stretch at all.

4                   And I believe it's fair to say that most people who have any  
5 kind of an engineering mind, including a person skilled in the art, would see  
6 that, okay, if you can hold your pants up with a belt and suspenders, that in  
7 some cases you might want to use both to get double duty, double effect.

8                   I don't think that's any kind of a stretch, and frankly, it is  
9 somewhat disappointing that when it comes to a patentable invention and  
10 obviousness, everything seems so apparent and any number of references  
11 can just be torn apart, stripped down, elements taken and thrown together to  
12 show the invention.

13                  And yet on something like this on a 112 issue, when we  
14 disclose the belt and we disclose suspenders, it's just impossible for a smart  
15 engineer to figure out how to use both simultaneously.

16                  JUDGE GARRIS: Why do you think that's the test for a  
17 written description requirement? Do you have any authority to support that  
18 view?

19                  MR. VICK: Any legal authority? No.

20                  JUDGE GARRIS: That's what we need here. We need legal  
21 authority, not your opinion.

22                  Is there any other argument you would care to make for this  
23 rejection?

24                  MR. VICK: For the 112? No, that's it.

25                  JUDGE GARRIS: Let me ask if we have any questions for  
26 you.

1 JUDGE TIMM: No further questions.

2 JUDGE GARRIS: No further questions?

3 JUDGE HASTINGS: No questions.

4 MR. VICK: Thank you very much. I appreciate your time. I  
5 will take those samples if you like, or you can keep them.

6 JUDGE GARRIS: Please do. I would like you to take them,  
7 please. I appreciate that.

8 MR. VICK: May I approach?

9 JUDGE GARRIS: Please do.

10 MR. VICK: Thank you. Have a great day.

11 JUDGE GARRIS: Thank you, sir.

12 MR. VICK: I appreciate your time.

13 JUDGE GARRIS: Thank you for coming in today and helping  
14 us with this case.

15 MR. VICK: Thank you.

16 Whereupon, the proceedings at 1:58 p.m. were concluded.

17